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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

WILLIAM J. SCHILLING, Individually and as COMMISSIONER OF SAVINGS AND LOAN ASSOCIATIONS FOR THE STATE OF ILLINOIS,

Petitioner,

vs.

TELEGRAPH SAVINGS AND LOAN ASSOCIATION OF CHICAGO and the OFFICERS and DIRECTORS thereof,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1.) Whether the Illinois Supreme Court correctly held that the former officers and directors of a state-chartered savings and loan association have the capacity and standing to seek judicial review of the State Commissioner's *ex parte* seizure without prior written notice of the association pursuant to Ill. Rev. Stat. ch. 17, §§ 3191, 3195 (1983), *formerly codified at* Ill. Rev. Stat. ch. 32, §§ 848, 852 (1979).

2.) Whether the Illinois Supreme Court correctly concluded that Respondents' claims are not barred by the doctrine of collateral estoppel.

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OPINIONS DELIVERED BELOW

1. *Telegraph Savings & Loan Ass'n of Chicago v. Schilling,* 115 Ill. App. 3d 331, 450 N.E.2d 798 (1st Dist. 1983) (Pet. App. C).

2. *Telegraph Savings & Loan Ass'n of Chicago v. Schilling,* 105 Ill. 2d 166, 473 N.E. 2d 921 (1984) (Pet. App. B).

JURISDICTION

The judgment of the Illinois Supreme Court was entered on November 30, 1984. A petition for rehearing was denied on February 1, 1985. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1257(3).

STATUTES AND REGULATION

12 U.S.C. Section 1464(d)(6)(A).

> The grounds for the appointment of conservator or receiver for an association shall be one or more of the following: (i) insolvency in that the assets of the association are less than its obligations to its creditors and others, including its members; (ii) substantial dissipation of assets or earnings due to any violation or violations of law, rules, or regulations, or to any unsafe or unsound practice or practices; (iii) an unsafe or unsound condition to transact business; (iv) willful violation of a cease-and-desist order which has become final; (v) concealment of books, papers, records, or affairs of the association for inspection to any examiner or any lawful agent of the Board. The Board shall have exclusive power and jurisdiction to appoint a conservator or receiver. If, in the opinion of the Board, a ground for the appointment of a conservator or receiver as herein provided exists, the Board is authorized to appoint ex parte and without notice a conservator or receiver for the association. In the event of such appointment, the association may, within thirty days thereafter, bring an action in the United States district court for the judicial district in which the home office of such association

is located, or in the United States District Court for the District of Columbia, for an order requiring the Board to remove such conservator or receiver, and the court shall upon the merits dismiss such action or direct the Board to remove such conservator or receiver. Such proceedings shall be given precedence over other cases pending in such courts, and shall be in every way expedited. Upon the commencement of such an action, the court having jurisdiction of any other action or proceeding authorized under this subsection to which the association is party shall stay such action or proceeding during the pendency of the action for removal of the conservator or receiver.

12 U.S.C. Section 1464(d)(6)(C).

Except as otherwise provided in this subsection, no court may take any action for or toward the removal of any conservator or receiver, or except at the instance of the Board, restrain or affect the exercise of powers or functions of a conservator or receiver.

12 U.S.C. Section 1729(c)(2).

(2) In the event the Federal Home Loan Bank Board determines—

(A) that (i) a conservator, receiver, or other legal custodian (whether or not the Corporation) has been or is hereafter appointed for an insured institution which is not a Federal savings and loan association other than by the Board (whether or not such institution is in default) and that the appointment of such conservator, receiver, or custodian, or any combination thereof, has been outstanding for a period of at least fifteen consecutive days, or (ii) an insured institution (other than a Federal savings and loan association) has been closed by or under the laws of any State;

(B) that one or more of the grounds specified in paragraph (6)(A) of section 1464(d) of this title, existed with respect to such institution at the time a

conservator, receiver, or other legal custodian was appointed, or at the time such institution was closed, or exists thereafter during the appointment of the conservator, receiver, or other legal custodian or while the institution is closed; and

(C) that one or more of the holders of withdrawable accounts in such institution is unable to obtain a withdrawal of his account, in whole or in part;

the Board shall have exclusive power and jurisdiction to appoint the Corporation as sole receiver for such institution. As used in this paragraph (2), the term "State" includes the Commonwealth of Puerto Rico, the territories and possessions, and any place subject to the jurisdiction of the United States.

12 U.S.C. Section 1729(d).

In connection with the liquidation of insured institutions in default, the Corporation shall have power to carry on the business of and to collect all obligations to the insured institutions, to settle, compromise, or release claims in favor of or against the insured institution, and to do all other things that may be necessary in connection therewith, subject only to the regulation of the court or other public authority having jurisdiction over the matter.

Ill. Rev. Stat. ch. 17, Section 3191 (1983) [formerly codified at Ill. Rev. Stat. ch. 32, Section 848 (1979)].

Sec. 7-8. Commissioner's Authority to take Custody. The Commissioner in his discretion may take custody of the books, records and assets of every kind and character of any association, trust, or association in liquidation, for any of the purposes hereinafter enumerated, if it appears from reports made to the Commissioner, or from examination made by or on behalf of the Commissioner:

(a) That the directors, officers, trustees, or liquidators have neglected, failed or refused to take

any action which the Commissioner may deem necessary for the protection of the association or trust, or have impeded or obstructed an examination; or

(b) That the withdrawable capital of the association is impaired to the extent that the realizable value of its assets is insufficient to pay in full its creditors and holders of its withdrawable capital; or that its permanent reserve capital is impaired; or

(c) That the association is unable to continue operation; or

(d) That the business of the association, trust or association in liquidation is being conducted in a fraudulent, illegal, or unsafe manner; or

(e) That the officers, employees, trustees, or liquidators have continued to assume duties or perform acts without giving bond as required by the provisions of this Act.

Unless the Commissioner finds that an emergency exists which may result in loss to members or creditors and requires that he take custody immediately, he shall give written notice to the directors, trustees, or liquidators specifying the conditions criticized and state a reasonable time within which correction may be made.

Ill. Rev. Stat. ch. 17, § 3193 (1983) [formerly codified at Ill. Rev. Stat. ch. 32, § 850 (1979)].

§ 7-10. Commissioner's Powers During Custody. During the period in which the Commissioner has such custody, the Commissioner and any of his duly authorized agents shall have all powers necessary to accomplish the purposes of custody, including (but not limited to) the powers, privileges and authority previously vested in the officers, directors, liquidators or trustees; and shall also include the power to call meetings of the members, former officers and direc-

tors, liquidators or trustees to consider and act upon matters deemed by the Commissioner to be of sufficient importance to consider the views of such persons.

Ill. Rev. Stat. ch. 17, § 3195 (1983) [formerly codified at Ill. Rev. Stat. ch. 32, § 852 (1979)].

§ 7-12. Notice of Custody-Action to Enjoin. Immediately upon taking custody of an association or trust, the Commissioner shall mail a written notice thereof to the president or secretary and not less than 2 directors of such association, or to 2 or more of the trustees of any trust, or 2 or more of the liquidators of an association in liquidation. If the contention is made that the Commissioner has no legal grounds for taking custody of the association or trust, the directors or officers of the association or the trustees or liquidators thereof, as the case may be, at any time within 10 days after the mailing of such notice, or within such further periods of time as the Commissioner may extend, but not to exceed an additional 60 days, may file a complaint in the Circuit Court of Sangamon County, Illinois or in the Circuit Court of the county in which the association is located, to enjoin further custody. The court thereupon shall cite the Commissioner to show cause why further custody should not be enjoined. If upon a hearing thereon, the court finds that such grounds did not or do not then exist, it may enter an appropriate order in accordance with the findings of fact, or an order enjoining the Commissioner or any appointees acting under his direction from further custody.

12 CFR Section 569a.4 (1980).

. . . Immediately upon taking possession of any insured institution the Corporation as Receiver shall forthwith take possession of and title to books, records, and assets of every description of such in-

stitution and of all offices of such institution. The Corporation as Receiver, by operation of law and without any conveyance or other instrument, act or deed, shall succeed to (a) all the rights, titles, powers and privileges of the insured institution, its members, holders of checking or savings accounts and nonwithdrawable accounts, its officers and directors or any of them, and (b) the titles to the books, records, and assets of every description of any conservator, receiver, or other legal custodian of such institution appointed under State law. Such members, holders of checking or savings accounts and nonwithdrawable accounts, officers or directors, or any of them, or any such conservator, receiver, or other legal custodian shall not thereafter have or exercise any such rights, powers, or privileges or act in connection with any asset or property of any nature of the institution in receivership.

STATEMENT OF THE CASE

At approximately 5:15 p.m. on May 22, 1980, Petitioner, William J. Schilling, Commissioner of Savings and Loan Associations for the State of Illinois ["Commissioner"], took custody of Respondent, Telegraph Savings and Loan Association of Chicago ["Telegraph"], a state-chartered institution, under Ill. Rev. Stat. ch. 17, § 3191 (1983), *formerly codified at* Ill. Rev. Stat. ch. 32, § 848 (1979) (when Telegraph was seized) [hereinafter cited as Ill. Rev. Stat. ch. 17, § 3191 (1983)]. The Commissioner gave no prior written notice of intent to take custody as is required by § 3191, but relied upon the statutory exception that allows an *ex parte* seizure if "the Commissioner

finds that an *emergency* exists which may result in loss to members or creditors and requires that he take custody immediately." *Id.* (emphasis supplied). (R.C6-8.)

This finding by the Commissioner, that an "emergency" existed, is the central issue in the present suit.

The Commissioner planned and timed his taking of custody to synchronize with action by the Federal Home Loan Bank Board ["FHLBB"]. By prior arrangement with the Commissioner, and within minutes following the Commissioner's action, the FHLBB, acting pursuant to 12 U.S.C. § 1729(c)(2), appointed the Federal Savings and Loan Insurance Corporation ["FSLIC"] as receiver of Telegraph.

The FSLIC, as receiver, immediately transferred Telegraph's liabilities, *e.g.*, its deposit accounts, to First Federal Savings & Loan Association of Chicago ["First Federal"] under a purchase and assumption agreement secretly negotiated earlier. FSLIC, as receiver, transferred Telegraph's assets to FSLIC, the corporation. Within minutes, or at most hours, after 5:15 p.m. on May 22, 1980, Telegraph ceased functioning as a savings and loan association.

The joint federal and state actions of May 22, 1980, proceeded pursuant to statutes which are not readily reconcilable from a jurisdictional standpoint. The Commissioner's action, which was based upon Ill. Rev. Stat. ch. 17, § 3191 (1983), must be challenged, under Illinois law, by an action to enjoin custody. This action must be filed in state court within ten days of the taking of custody. Ill. Rev. Stat. ch. 17, § 3195 (1983), *formerly codified at* Ill. Rev. Stat. ch. 32, § 852 (1979) (when Telegraph was seized) [hereinafter cited as Ill. Rev. Stat. ch. 17, § 3195 (1983)]. The act of the federal officials, i.e., the appoint-

ment of a receiver, which was based upon 12 U.S.C., § 1729(c)(2), must be challenged by an original action in federal district court pursuant to the provisions of 12 U.S.C. § 1464(d)(6)(A).

On June 2, 1980, Telegraph filed two essentially identical lawsuits, one in state court and one in federal court. In both lawsuits, Telegraph sued the Commissioner under Ill. Rev. Stat. ch. 17, § 3195, and the FHLBB and the FSLIC under 12 U.S.C. § 1464(d)(6)(A). The lawsuit filed in federal district court, 80 C 2792, was assigned to Judge Grady, while the state court lawsuit, 80 CH 3860, was assigned to Judge Higgins.

The federal defendants immediately removed the state suit to federal district court, where the matter, 80 C 2782, was assigned to Judge Prentice Marshall.

Telegraph filed a motion before Judge Marshall to remand the action to state court. Telegraph maintained either that the entire receivership issue could be litigated in state court, or, in the alternative, that the counts against the Commissioner under state law, i.e., the emergency issue, were severable and should be remanded to state court.

On June 12, 1980, Judge Marshall, aware that Respondents had initiated an original federal action pending before Judge Grady, ruled on the motion to remand. (R.C49-55.) Judge Marshall ruled that the federal receivership being challenged could be challenged originally only in federal district court. Judge Marshall ruled that the action against the Commissioner with respect to his taking of custody was "a part and parcel" of the claim against the federal defendants, over which the state court had no jurisdiction. (R.C52.) According to Judge Marshall, the counts under the Illinois Savings and Loan Act were not sever-

able, and therefore he refused to remand them to state court. He did note, however, that Telegraph "will be permitted to refile [the claims against the Commissioner] in the State Court." (R.C52.)

At this point, Telegraph had no action remaining in state court and had obtained no ruling by any state court judge on the issue of whether the state courts had jurisdiction over the state law counts against the Commissioner. On the same day that Judge Marshall declined to remand to state court, Telegraph filed a new original action in state court. This action, 80 CH 4170 (R.C2-5), which was also assigned to Judge Higgins, proceeded against only the Commissioner under the Illinois Savings and Loan Act and is the basis of the present appeal.

The Commissioner, represented by the Attorney General of the State of Illinois, filed a motion to dismiss the subsequent state action, 80 CH 4170. (R.C18-20.) Relying on Judge Marshall's June 12, 1980 dismissal and refusal to remand to the state court, the Attorney General took the position, *inter alia*, that the claims against the Commissioner were not severable from the claim against the federal defendants, and that therefore, the state court had no jurisdiction. On June 30, 1980, Judge Higgins granted the Commissioner's motion to dismiss "for reasons stated of record." (R.C70.) This ruling was appealed and held in abeyance pending resolution of the issues in federal court.

After Judge Higgins' dismissal, Telegraph was limited to its federal action which pleaded both state and federal statutory violations. In that action, Judge Grady specifically reserved adjudication of the claims under the Illinois Savings and Loan Act, and ordered an initital trial on the federal issues alone. At the conclusion of the trial on the federal statutes pertaining to receivership, 12

U.S.C. § 1464(d)(6)(A) and 12 U.S.C. § 1729(c)(2), Judge Grady first held that the federal defendants had not violated the federal statutes. *Telegraph Savings & Loan Ass'n v. FSLIC*, 564 F.Supp. 880 (N.D. Ill. 1982), *aff'd sub nom. Telegraph Savings & Loan Ass'n v. Schilling*, 703 F.2d 1019 (7th Cir.), *cert. denied*, 104 S.Ct. 484 (1983).

Then Judge Grady raised the issue as to whether he should abstain from the state counts before him on the grounds that they should be litigated in state court, since the counts presented "difficult questions of state law which are of first impression." *Telegraph Savings and Loan Ass'n v. FSLIC*, No. 80 C 2792 (N.D. Ill. Feb. 19, 1982) (order for status hearing), *aff'd sub nom. Telegraph Savings & Loan Ass'n v. Schilling*, 703 F.2d 1019 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983) (Resp. App. D 1).

On March 18, 1982, Judge Grady abstained as to the state law issues before him and dismissed them without prejudice. *Telegraph Savings & Loan Ass'n v. FSLIC*, No. 80 C 2792, slip op. (N.D. Ill. March 18, 1982), *aff'd sub nom. Telegraph Savings & Loan Ass'n v. Schilling*, 703 F.2d 1019 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983) (Resp. App. A 1).

Thus, Telegraph was left in an anomalous position. One federal district court (Judge Marshall) had refused to sever and to remand the state law issues to state court before it dismissed the action based on lack of derivative jurisdiction, and had held that the state law issues were part of the federal issues which could be litigated only in federal district court.

Another federal district court (Judge Grady) had declined to hear the state law issues and had held that they properly should be heard in state court. This ruling was affirmed by the Seventh Circuit. In the meantime, the

state court (Judge Higgins) dismissed the state law action, relying principally on the initital federal district court ruling that the state law issues were not severable from the federal issues.

Thus, as a result of Judge Higgins' dismissal of the original state court action filed on June 12, 1980, Telegraph was left without a forum in which to litigate its claims against the Commissioner under Ill. Rev. Stat. ch. 17, §§ 3191, 3195 (1983).

The apparently contradictory rulings by the two federal district courts is easily explained by the contradictory positions taken by the Defendants. Before Judge Marshall, early in the litigation, the Defendants argued that the state law claims were not severable from the federal claims, which federal claims, pursuant to statute, could only be brought in federal court. Persuaded by the Defendants' argument, Judge Marshall refused to remand the state law issues to state court. Before Judge Higgins, the Petitioner also argued that the federal courts had exclusive jurisdiction over the state law claims. Persuaded by the Petitioner's arguments and in reliance upon Judge Marshall's earlier ruling, Judge Higgins dismissed the claims in state court. Back in federal court at a later time before Judge Grady, however, the Petitioner formally took the position that the state courts—not the federal courts—should have jurisdiction over the state law claims. "Defendant Schilling's Position With Regard to Disposition of the Remaining Counts" at 2 (Resp. App. B 1-2) ["Schilling's Position"]. In reliance upon Petitioner's formal position that the state courts should have jurisdiction over the matter, Judge Grady dismissed the state law claims.

On May 25, 1983, the Illinois Appellate Court for the First District unanimously reversed Judge Higgins' dismissal and held:

> The inconsistent positions taken by the State require a reversal of the dismissal by the circuit court of Cook County and a remandment to that court to determine whether the Commissioner exceeded his State powers under section 7-8 [of the Illinois Savings and Loan Act] (Ill. Rev. Stat. 1981, ch. 17, par. 3191) and to what relief plaintiffs are entitled under section 7-12 (Ill. Rev. Stat. ch. 17, par. 3195).

Telegraph Savings & Loan Ass'n of Chicago v. Schilling, 115 Ill. App. 3d 331, 340, 450 N.E.2d 798, 803 (1983) (Pet. App. C 11).

The Illinois Supreme Court affirmed the Illinois Appellate Court decision. *Telegraph Savings & Loan Ass'n of Chicago v. Schilling*, 105 Ill. 2d 166, 473 N.E. 2d 921 (1984) (Pet. App. B). With respect to the Commissioner's argument that Telegraph lacked the capacity or standing to bring suit against the Commissioner, the Illinois Supreme Court held:

> The powers granted to the Federal receiver, pursuant to the Federal Regulation, and the Commissioner pursuant to Section 7-10 of the Act are merely the administrative powers necessary for the receiver to conduct the business operations of the seized institution. The bestowal of such powers does not deprive the seized institution of its statutory right to challenge the Commissioner's original take-over. The clear language of the statute indicates otherwise. Thus, by bringing its State action pursuant to Section 7-12 of the Act, Telegraph was merely exercising its statutory right to judicial review of the Commissioner's actions. Furthermore, as Telegraph correctly observes, this Court has previously stated "that if the legislature did not accord the right to obtain judicial review and control of the [Commissioner's] conduct the Savings & Loan Act would be constitutionally suspect."

Id., 105 Ill. 2d at 174-75, 473 N.E.2d at 924 (Pet. App. B5). The Illinois Supreme Court also ruled that the doctrine of collateral estoppel was inapplicable to the case at bar: the Illinois Supreme Court specifically held that the issue of "emergency" had not been adjudicated by the federal courts. *Id.*, 105 Ill. 2d at 177, 473 N.E.2d at 926 (Pet. App. B8).

PREFATORY NOTE

The case at bar presents the issue of whether the Courts of the State of Illinois have the power to review arbitrary *ex parte* seizures of private property without notice by high State officials or whether such high public officials may insulate their arbitrary *ex parte* seizures from judicial review by taking inconsistent positions as to jurisdiction before the State and Federal Courts.

ARGUMENT

I.

RESOLUTION OF THIS CASE IS NOT NECESSARY AS IT DOES NOT PRESENT PRESSING ISSUES OF NATIONAL IMPORTANCE.

Telegraph's claim in the instant case arises from the interraction of the federal and state statutes in effect at the time of Telegraph's seizure and liquidation. In order for the FHLBB to have seized control of Telegraph and to have appointed FSLIC receiver, 12 U.S.C. § 1729(c)(2) required that the state-chartered Savings & Loan must first have been closed by or under state law. Thus, state closure of the savings and loan association was a prerequisite to the FHLBB's appointment of FSLIC as receiver.

Ill. Rev. Stat. ch. 17 § 3191 grants the Commissioner the authority to take custody of an Illinois Savings & Loan under certain circumstances. However, unless an emergency exists, the Commissioner is first required to give written notice to the savings and loan association and to state a reasonable time within which corrections may be made. The Commissioner gave no such written notice in the instant case. Thus, unless an emergency existed, the Commissioner's seizure and closure of Telegraph was illegal under Illinois law.

The Commissioner's Petition for Writ of Certiorari does not present an important question of federal law that should be decided by this Court because statutory amendments have made it unlikely that the issue will recur. In the Garn-St. Germain Depository Institutions Act of 1982 (Pub. L. No. 97-320, 96 Stat. 1469 *et seq.*), Congress ex-

panded the FHLBB's independent authority to appoint a federal receiver for state-chartered Savings & Loan Associations. Section 122(d) of the Act, 96 Stat. 1482 (12 U.S.C. § 1729(c)(1)(B)), now authorizes the FHLBB to appoint a receiver for a state-chartered institution without the necessity for a "closing" by or under state law. The FHLBB's authority may be exercised immediately if written approval from the appropriate state official is obtained; if such approval is not obtained, the FHLBB must wait 90 days. Under this broad expansion of the FHLBB's authority to appoint a receiver for a state institution, it is unlikely that any of the questions of law raised by the Commissioner will arise in the future.[1]

II.

THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT TELEGRAPH HAS THE CAPACITY AND STANDING TO SEEK JUDICIAL REVIEW OF THE COMMISSIONER'S *EX PARTE* SEIZURE.

A. The Commissioner is Estopped From Asserting That Telegraph Lacks Capacity or Standing Because the "Inconsistent Positions Taken by the State" in Parallel State and Federal Proceedings Have Been an Attempt by the Commissioner to Avoid Judicial Review of His *Ex Parte* Seizure of Telegraph.

Since the Commissioner's *ex parte* seizure of Telegraph on May 22, 1980, Telegraph has continuously sought re-

[1] Although these sections of the Garn-St. Germain Depository Institutions Act of 1982 are subject to sunset provisions after three years, two bills have recently been submitted to Congress which would postpone the termination date of the 1982 amendment. H.R. 1680, 99th Cong., 1st Sess. § 805(2) (1985); S. 759, 99th Cong., 1st Sess. § 805(2) (1985). In any event, it is nevertheless unlikely that the language here at issue will be a subject of litigation in the foreseeable future.

view of the Commissioner's actions. To date, the Commissioner successfully has avoided any judicial review of his declaration that an "emergency" existed to justify taking custody of Telegraph.

Because of the overlap between state and federal jurisdiction and remedies, Telegraph filed suit in both state and federal courts to ensure judicial review of the Commissioner's actions. The Commissioner, however, has dodged any such review by taking inconsistent positions regarding jurisdiction depending upon which court he addresses. The Illinois Appellate Court unanimously held that "[t]he inconsistent positions taken by the State" required a remand to the trial court for judicial review of the Commissioner's *ex parte* seizure. *Telegraph Savings & Loan Ass'n v. Schilling*, 115 Ill. App. 3d 331, 340, 450 N.E.2d 798, 803 (1983) (Pet. App. C 11).

Comparison of the parallel state and federal proceedings highlights the State's inconsistent positions.

After the first state court action was removed to federal court and ultimately was dismissed by Judge Marshall for lack of derivative jurisdiction, Telegraph and its officers and directors filed the instant action. On June 30, 1980, Judge Higgins granted Defendant's Motion to Dismiss. Telegraph submits that a fair reading of the transcript of the proceedings before Judge Higgins shows that the court's principal basis for dismissal was a concern that the entire matter, including the state law count against the Commissioner, was under exclusive federal jurisdiction:

> Judge Higgins: "And I have given great consideration to Judge Marshall's comments and opinions regarding the disposition of the case as it affected removal from this Court and his refusal to remand,

> and I fully believe under those circumstances the Federal Court now has jurisdiction over the subject matter of the suit that you have filed in this Court."

Transcript of Proceedings before J. Higgins at 29-30 (June 30, 1980) (Resp. App. E 6).

After Judge Higgins dismissed the action against the Commissioner, the parties proceeded to litigate the issues pending before Federal District Court Judge Grady, which were based wholly or partially on federal law. The federal court, however, did not permit Telegraph to litigate the issues based on state law. After trial on the federal law issues, Judge Grady raised the question of whether he should rule on the state law issues:

> These counts involve difficult questions of state law which are of first impression. The Court is of the opinion that unless fairness to litigants dictates otherwise, *UMW v. Gibbs*, 383 U.S. 715, 726 (1966), the state courts should have the opportunity to address these claims.

Telegraph Savings & Loan Ass'n v. FSLIC, No. 80 C 2792, (N.D. Ill. Feb. 19, 1982) (order for status hearing), *aff'd sub nom. Telegraph Savings & Loan Ass'n v. Schilling*, 703 F.2d 1019 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983) (Resp. App. D 1).

Judge Grady requested the Attorney General to advise him of the State's position on the issue of jurisdiction. Addressing the question of whether the federal court should decide the issues against the Commissioner under Illinois law, the Attorney General formally took the position that abstention on the part of the federal court was required.[2]

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[2] "Defendant Schilling's Position With Regard to the Disposition of the Remaining Counts" at 2 (Resp. App. B 1-2) ["Schilling's Position"].

This position was diametrically opposed to his earlier representation to the state trial judge that the federal courts had exclusive jurisdiction over the matter.

The Attorney General agreed with Judge Grady that no Illinois court had construed Ill. Rev. Stat. ch. 17, §§ 3191, 3195 under the circumstances of the instant case. Citing *City Investing Co. v. Simcox*, 633 F.2d 56 (7th Cir. 1980), the Attorney General maintained that abstention was required because the Illinois statutes were susceptible to a construction by the Illinois judiciary which would avoid the need for the federal court to decide the federal questions or at least materially would alter the nature of the problem. *Id.* at 64. The Attorney General also supported abstention "because the state court should decide such difficult questions of state law," and even added that "Schilling suggests that plaintiff pursue that [state court] appellate review." Schilling's Position at 2, 3, (Resp. App. B 2); *S.K. Olivar Co. v. Denton Enterprises, Inc.*, 413 F. Supp. 1336, 1338 (N.D. Ill. 1976).

Judge Grady proceeded to dismiss without prejudice the claims against the Commissioner under state law, stating as follows: "[w]e exercise our discretion to refuse jurisdiction over the state law claims in these pendant counts and these claims are dismissed without prejudice for lack of jurisdiction" *Telegraph Savings & Loan Ass'n v. FSLIC*, No. 80 C 2792, slip op. at 1 (N.D. Ill. March 18, 1982), *aff'd sub nom. Telegraph Savings & Loan Ass'n v. Schilling*, 703 F.2d 1019 (7th Cir.), *cert. denied*, 104 S. Ct. 484 (1983) (Resp. App. A 1).

Judge Grady was aware of the possibility that the Attorney General would be able to take one position on subject matter jurisdiction in federal court and a contrary position in state court, and that Plaintiffs faced the possibility of being "whip-sawed" thereby. Transcript of

Proceedings before J. Grady at 22 (Feb. 26, 1982) (Resp. App. C 5).

The Illinois Appellate Court unanimously agreed that the Commissioner had taken "inconsistent positions," and had attempted to leave Telegraph "without a forum in which to settle its state law claims":

> It is apparent from the record before us that the State recognized that the Illinois courts were the proper forum for the disposition of plaintiffs' state law claims; it is also clear that the State, while it so told the federal courts, also told the state court that the federal courts had jurisdiction of those claims. Judge Grady properly realized that the State's challenge in the state court to state court jurisdiction of Telegraph's state law claims because of the claimed exclusive federal jurisdiction and its challenge in the federal court to that court's jurisdiction over state law claims could result in Telegraph being "whip-sawed" by being left without a forum in which to settle its state law claims.

Telegraph, 115 Ill. App. 3d at 339, 450 N.E. 2d at 802 (Pet. App. C 10).

The dismissal of the state law counts in federal court under these circumstances was an invitation for the Illinois courts to entertain and to decide the counts brought under Illinois law against the Commissioner. The Seventh Circuit made the invitation explicit: "Since the state court dismissal is currently on appeal *we leave it for the state appellate court to determine if Telegraph has any valid state claim.*" *Telegraph Savings & Loan Ass'n v. Schilling*, 703 F.2d 1019, 1030 (7th Cir.), *cert. denied*, 104 S. Ct. 341 (1983) (emphasis added) (Pet. App. E 20). Telegraph submits that in light of both this dismissal without prejudice in federa. court and the Commissioner's inconsistent positions in the state and federal courts, the Illi-

nois Supreme and Appellate Courts correctly reversed Judge Higgins' order of June 30, 1980 for he clearly contemplated that the issues before him would be adjudicated in federal court.

B. Telegraph's Standing and Capacity to Seek Judicial Review of the Commissioner's Ex Parte Seizure Is Both Expressly Granted By Statute and Constitutionally Mandated.

The Illinois Savings and Loan Act expressly grants Telegraph a right to challenge the Commissioner's actions:

> If the contention is made that the Commissioner has no legal grounds for taking custody of the association or trust, the directors or officers of the association . . . may file a complaint[.]

Ill. Rev. Stat. ch. 17, § 3195 (1983).

Not only is Telegraph's standing and capacity to seek judicial review of the Commissioner's *ex parte* seizure expressly granted by statute, it is constitutionally mandated. The Fourteenth Amendment provides "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV. Due process requires that no property be taken without "an *opportunity* . . . granted at a meaningful time and in a *meaningful manner* . . . for [a] hearing appropriate to the nature of the case[.]" *Boddie v. Connecticut*, 401 U.S. 371, 378 (1972) (citations omitted; last emphasis added). While due process generally requires that the hearing be conducted prior to the taking of property, in situations where this predeprivation hearing is impractical or impossible and where some valid governmental interest is at stake, the hearing may be postponed until after the taking. *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Fahey v. Mallonee*, 332 U.S. 245 (1947).

However, a post-deprivation remedy satisfies procedural due process requirements only when the necessity of quick action or the impracticality of providing a meaningful predeprivation hearing is coupled with "the availability of some *meaningful opportunity subsequent to the initial taking* for a determination of rights and liabilities." *Parratt v. Taylor*, 451 U.S. 527, 541 (1981) (emphasis added). Thus, a statute or regulatory scheme that provides for the taking of property without the availability of even a post-deprivation hearing will clearly not pass constitutional muster. *Id.*

The Commissioner asserts (Pet. 8-11) that Telegraph lacks the capacity or standing to seek judicial review of his *ex parte* seizure. Realizing that the Commissioner's position would leave Telegraph without even a post-deprivation hearing and would thus render the statute constitutionally infirm, the Illinois Supreme rejected the Commissioner's assertion. "Furthermore, as Telegraph correctly observes, this court has previously stated 'that if the legislature did not accord the right to obtain judicial review and control of the [Commissioner's] conduct the Savings and Loan Act would be constitutionally suspect.' " *Telegraph Savings & Loan*, 105 Ill. 2d at 174-75, 473 N.E. 2d at 924 (Pet. App. B5).

C. The Federal Statutes and Regulation Recognize the Capacity and Standing of a Savings and Loan Association to Seek Judicial Review of an Ex Parte Seizure.

When the FHLBB appoints FSLIC receiver, the federal regulations grant FSLIC all the rights of the savings and loan association, its officers and directors. 12 C.F.R. § 569a.4 (1980). This grant of power is necessary to enable the receiver to operate the business effectively during his

custody.[3] Nonetheless, the federal regulatory framework allows the former officers and directors to retain the limited right to challenge the appointment of a receiver under 12 U.S.C. § 1464(d)(6)(A).

Similarly, if the Commissioner takes custody of a savings and loan association, the Illinois Savings and Loan Act grants the Commissioner all of the rights of the seized association, its officers and directors. Ill. Rev. Stat. ch. 17, § 3193 (1983). Just as the federal statutes allow a seized association's former officers and directors to retain the right to challenge the federal receivership, so too does the Illinois Savings and Loan Act allow the former officers and directors to challenge the legality of the Commissioner's *ex parte* seizure of the savings and loan association. Ill. Rev. Stat. ch. 17, § 3195 (1983).

The policy underlying both statutes is clear; the former officers and directors are allowed to retain the right to challenge the seizure in order to ensure meaningful judicial review of *ex parte* seizures.

The Commissioner, however, attempts to insulate his actions from judicial review by asserting that Telegraph lacks the capacity or standing to challenge the Commissioner's *ex parte* seizure. Specifically, the Commissioner argues that the federal regulations vest all rights, powers, titles and privileges of the association and its officers and directors, including the right to assert all choses in action, in the FSLIC (Pet. 9). Thus, the Commissioner

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[3] The legislative history to 12 U.S.C. § 1729(d), the statutory basis for 12 C.F.R. § 659a.4, supports Respondents' position that this federal grant of power to the FSLIC was not intended to override judicial review under state law but was to include only "the usual power given to emergency corporations to employ and incur expenses." H.R. Rep. No. 1922, 73d Cong., 2d Sess. 3 (1934).

asserts that if his *ex parte* seizure is to be challenged, it must be challenged by the FSLIC—the party who not only is the prime beneficiary of the Commissioner's seizure but who also designed and orchestrated the Telegraph takeover. Such a statutory construction clearly does not comport with either the statutory policy of ensuring, or the constitutional mandate requiring an opportunity for meaningful judicial review of *ex parte* seizures. *Boddie v. Connecticut*, 401 U.S. at 378; *Parratt v. Taylor*, 451 U.S. at 541.

The Commissioner further asserts that his position has been adopted in three federal District Court cases. (Pet. 9). Respondent respectfully submits that a fair reading of the cases discloses that none of them even tangentially addresses the issue whether the imposition of the FSLIC as federal receiver divests the former officers and directors of a savings and loan association of the right to judicial review of the state Commissioner's *ex parte* seizure of the association. In *First Savings & Loan Ass'n v. First Federal Savings & Loan Ass'n*, 531 F. Supp. 251 (D. Hawaii 1981), the court dismissed the claim under 12 U.S.C. § 1464(d)(6)(A) because the plaintiffs had failed to join the FHLBB and had therefore sued the wrong defendant (FSLIC). While the court did dismiss a tort suit by the former officers and directors against the purchasers of the association's assets due to lack of standing or capacity, the court did not consider whether judicial review of a state Commissioner's actions was precluded.

In *First Savings & Loan Ass'n v. First Federal Savings & Loan Ass'n of Hawaii*, 547 F. Supp. 988 (D. Hawaii 1982), the plaintiffs refiled their previous complaint naming the FHLBB as a defendant. The court, however, dismissed the case because the action was not instituted within 30 days as required by 12 U.S.C. § 1464(d)(6)(A).

The availability of judicial review of the state Commissioner's actions was simply not an issue before the court.

Finally, in *Manning Savings & Loan Ass'n v. FSLIC*, No. 83 C 757, slip op. (N.D. Ill. Sept. 14, 1983) (Pet. App. H), the availability of judicial review of the Illinois Commissioner's action was not in issue because the Commissioner had never taken custody of the association under Ill. Rev. Stat. ch. 17, § 3191 (1983). The Commissioner had not taken custody of the association because the 1982 amendment[4] to 12 U.S.C. § 1729 gave the FHLBB the power to appoint the FSLIC receiver without the need for a closing of the association by or under state law. Thus, the court in *Manning Savings* found that the plaintiffs lacked the capacity to maintain any action other than a § 1464(d)(6)(A) action—not because, as the Commissioner asserts, the right to seek judicial review under Ill. Rev. Stat. ch. 17, § 3195 is vested in the FSLIC—but because the Commissioner "did not take custody of Manning[.]" *Manning Savings*, slip op. at 8 n.3 (Pet. App. H).

The Illinois Supreme Court's analysis of the three federal cases and rejection of the Commissioner's position is particularly cogent:

> The Commissioner's reliance on these cases is misplaced. It is true that these cases expressly recognize that the FSLIC acquires all powers necessary to administer the operations of a seized institution pursuant to the regulations (12 C.F.R. sec. 569a.4 (1980) promulgated under 12 U.S.C. section 1729(d) (1976). This includes the power to represent the institution in any legal action. (12 C.F.R. sec.

[4] Garn-St. Germain Depositary Institutions Act of 1982, Pub. L. No. 97-230, 96 Stat. 1469. The passage of the 1982 amendment to § 1729(c) has made future litigation of the issues in the present case highly unlikely. *See* Argument I, *supra* pp. 15-16.

> 569a.6(a)(2-3)(1980).) At the same time, however, these cases acknowledge the limited right of an association to challenge the appointment of a receiver pursuant to 12 U.S.C. section 1464(d)(6)(A)(1976). The Illinois Savings and Loan Act contains similar provisions. Thus, pursuant to section 7-10 of the Act, the Commissioner, if he takes custody of an association, succeeds to "all powers necessary to accomplish the purposes of custody, including (but not limited to) the powers, privileges and authority previously vested in the officers, directors, liquidators or trustees . . . ." (Ill. Rev. Stat. 1979, ch. 32, par. 850, now Ill. Rev. Stat. 1983, ch. 17, par. 3193.) In a provision analogous to 12 U.S.C. section 1464(d)(6)(A) (1976), section 7-12 of the Act expressly authorizes a challenge to the Commissioner's custodial action. . . .
>
> The powers granted to the Federal receiver, pursuant to the Federal regulation, and the Commissioner pursuant to section 7-10 of the Act are merely the administrative powers necessary for the receiver to conduct the business operations of the seized institution. The bestowal of such powers does not deprive the seized institution of its statutory right to challenge the Commissioner's original takeover. The clear language of the statute indicates otherwise. Thus, by bringing its State action pursuant to section 7-12 of the Act, Telegraph was merely exercising its statutory right to judicial review of the Commissioner's actions.

Telegraph Savings & Loan, 105 Ill. 2d at 173-74, 473 N.E. 2d at 923-24 (Pet. App. B 4-5).

D. Telegraph's Independent Right to Seek Judicial Review of the Commissioner's Ex Parte Seizure Was Expressly Recognized By the United States Court of Appeals for the Seventh Circuit.

On appeal to the Seventh Circuit, Telegraph contended that the contradictory rulings by U.S. District Court

Judges Marshall (refusing to sever and remand the state law claims to state court on the grounds that the state law claims were "part and parcel" of the federal action) and Grady (abstaining from deciding the state law claims on the grounds that the claims should properly be litigated in state court), in conjunction with the intervening ruling by Illinois Circuit Court Judge Higgins (dismissing the state law claims against the Commissioner in reliance upon Judge Marshall's ruling that the state law claims were not severable from the federal action), operated so as to deny Telegraph a forum in which to challenge the Commissioner's finding that an "emergency" existed which justified his *ex parte* seizure without prior written notice.

The Seventh Circuit rejected Telegraph's argument that the conflicting U.S. District Court rulings had left it without a forum in which to litigate its state law claims and expressly recognized the potential availability of a state law action:

> We find nothing contradictory in the two rulings. Judge Marshall refused to remand the claim against the Commissioner because he believed that all Telegraph's claims were part of its challenge to the FHLBB's appointment of the FSLIC as receiver and that a challenge to a federal receivership could be maintained only in federal court. Judge Grady held that review of state law questions was not part of an action to challenge a receiver under 12 U.S.C. § 1729(c)(2). *The fact that Judge Grady dismissed the separately pleaded state law counts without prejudice merely indicates that these claims are independent of Telegraph's challenge to a federal receivership under federal law.* The dismissal cannot be read as a ruling on the validity of the state claims.
>
> Telegraph's real complaint is that the state court judge dismissed Telegraph's second state court ac-

> tion because he read Judge Marshall's dismissal to mean that the state court had no jurisdiction to hear the state claims. *Whether Telegraph has a state cause of action is properly left to the state court.* Neither Judge Marshall's ruling nor Judge Grady's ruling is binding on the state court. *Since the state court dismissal is currently on appeal we leave it for the state appellate court to determine if Telegraph has any valid state claim.*

Telegraph Savings & Loan Ass'n v. Schilling, 703 F.2d at 1029-30 (emphasis added) (Pet. App. E 19-20). Thus, the Seventh Circuit denied the appeal based in part upon its recognition of Telegraph's independent right to judicial review of the Commissioner's *ex parte* seizure in state court.

III.

THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT TELEGRAPH'S CLAIMS WERE NOT BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL.

Issue preclusion under the doctrine of collateral estoppel occurs only when an issue has been "actually and necessarily determined by a court of competent jurisdiction[.]" *Montana v. United States*, 440 U.S. 147, 153 (1979). The central issue in the present suit is whether an "emergency" existed which justified the Commissioner's seizure of Telegraph without prior written notice under Ill. Rev. Stat. Ch. 17, § 3191 (1983). Because the Illinois Supreme and Appellate Courts found that the "emergency" issue had not been actually determined by the federal courts, the Illinois Supreme and Appellate Courts both found the doctrine of collateral estoppel inapplicable to the case at bar:

Because the Federal court refused to assert pendent jurisdiction over the counts based entirely on State law, and dismissed the claims without prejudice for lack of jurisdiction, the appellate court, in the instant case, determined that Telegraph was entitled to a State-court adjudication of those issues. Accordingly it reversed the circuit court's dismissal of the action, stating:

> "Whatever the binding effect of the opinion of the Court of Appeals [Seventh Circuit] may be on certain facets of the litigation, it does not necessarily foreclose a finding by the State court of a lack of an emergency. Telegraph has a right to have its State law claims resolved in a State court." 115 Ill. App. 3d 331, 340.

. . . When determining whether the doctrine of collateral estoppel precludes the resolution of the State-law claim, therefore, the only relevant inquiry is whether the Federal court decided that an emergency existed. We need not speculate as to whether the factual inquiry regarding the State "emergency" issue was ever resolved by the Federal courts. The Federal district court, as well as the Seventh Circuit court, expressly recognized that the State-law claims were distinct from Telegraph's challenge of the Federal receivership and declined to address the State claims. It follows, therefore, that the doctrine of collateral estoppel will not act as a bar to a State court adjudication of the emergency issue.

Telegraph Savings & Loan Ass'n v. Schilling, 105 Ill. 2d at 177-78, 473 N.E.2d at 925-26 (Pet. App. B7-8).

The Federal courts made no findings as to whether an emergency existed. Further, a determination of the "emergency" issue would not have been "necessary" to the federal courts' decisions under 12 U.S.C. § 1464(d)(6)(A). The doctrine of collateral estoppel simply has no application in the instant case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 2792

TELEGRAPH SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, et al.,

Defendants.

ORDER

The court has requested the parties to address the question of what should be done with the remaining counts of the second amended complaint, now that judgment has been entered in favor of defendants on Counts III and V. After due consideration, our disposition of the remaining counts is as follows:

COUNTS I AND II

Counts I and II combine state law claims under 42 U.S.C. § 1983 and present novel questions of state statutory construction which are neither addressed nor resolved by the findings of the court on Counts III and V. Accordingly, we exercise our discretion to refuse jurisdiction over the state law claims in these pendant counts and these claims are dismissed without prejudice for lack of jurisdiction. We will stay the trial of the federal claims until the state court has disposed of the state law claims.

COUNT IV

Count IV is an action under 42 U.S.C. § 1983, alleging that the federal defendants conspired under color of state law with state defendants to violate plaintiff's property rights. Named in this count are the individual defendants Janis, Dolton and DiPrete as well as the agency defendants Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation. The agency defendants are not proper parties since they cannot be sued *eo nomine* unless Congress has explicitly or impliedly made the agency subject to such suits. *Blackmar v. Guerre*, 342 U.S. 512 (1951); *Benima v. Smithsonian Institution*, 471 F. Supp. 62, 66-67 (D. Mass. 1979); 1 *Moore's Federal Practice*, ¶ 0.65 [2.-1] at pp. 700.87-88. Accordingly, the defendants FHLBB and FSLIC are dismissed from Count IV for lack of jurisdiction.

It is possible that Count IV is based upon a *Bivens* theory as well as § 1983, but the federal agencies are not proper parties under a *Bivens* claim either. *United States v. Testan*, 424 U.S. 392 (1976).

Turning to the individual defendants in Count IV, there is no *Bivens* action if all the conduct complained of is alleged to have been in complicity with state officials. In that event, § 1983 provides an adequate remedy and there is no need to imply a constitutional cause of action. *See Neely v. Blumenthal*, 458 F. Supp. 945 [D.D.C. 1978). *See also Thedford v. Joyce*, No. 79 C. 3061, Slip Op. at 6 (N.D. Ill. June 8, 1980) and cases cited therein. Accordingly, if Count IV does attempt to allege a *Bivens* claim against the individual federal defendants, that claim is dismissed.

What remains of Count IV is the § 1983 action against the individual federal defendants. We reject defendants' argument that they are entitled to absolute immunity under the reasoning of *Butz v. Economou*, 438 U.S. 478, 515-516 (1978). In describing those executive officials who perform functions "analogous to a prosecutor" and thus should enjoy absolute immunity, the Court emphasized that the acts of these officials would be subject to scrutiny

and review in the very proceedings in which the challenged action took place:

> The defendant in an enforcement proceeding has ample opportunity to challenge the legality of the proceeding. An administrator's decision to proceed with a case is subject to scrutiny in the proceeding itself. The respondent may present his evidence to an impartial trier of fact and obtain an independent judgment as to whether the prosecution is justified. His claims that the proceeding is unconstitutional may also be heard by the courts. Indeed, respondent in this case was able to quash the administrative order entered against him by means of judicial review. See *Economou v. U.S. Department of Agriculture*, 494 F.2d 519 (CA2 1974).
>
> We believe that agency officials must make the decision to move forward with an administrative proceeding free from intimidation or harassment. Because the legal remedies already available to the defendant in such a proceeding provide sufficient checks on agency zeal, we hold that those officials who are responsible for the decision to initiate or continue a proceeding subject to agency adjudication are entitled to absolute immunity from damages liability for their parts in that decision.

438 U.S. at 515-516. These safeguards are absent here, where the plaintiffs had no opportunity to challenge the seizure and sale of Telegraph until after the sale had been completed. We understand *Butz* to require a look at the facts of the paricular [sic] case, and we believe the individual federal defendants in this case enjoy only a qualified immunity. *Butz*, 438 U.S. at 407; *Scheuer v. Rhodes*, 416 U.S. 232, 247-248 (1973). The allegations of § 1983 violations by the individual federal defendants are therefore not subject to dismissal. However, our decision on many of the questions involved in Count IV depends on resolution of state law questions upon which Counts I and II are based. Accordingly, trial of the § 1983 claims of Count

IV will be stayed pending state court resolution of the issues framed by Counts I and II.

COUNT VI

Count VI, which is apparently directed against all federal defendants and the defendant Schilling, seeks money damages[1] based upon misrepresentation concerning defendants' intentions in regard to the appointment of a receiver. The count must be dismissed as to the federal defendants because the exclusive damage remedy is the Federal Tort Claims Act and that Act contains a specific exception for "any claim arising out of . . . misrepresentation, deceit, or interference with contract rights." 28 U.S.C. § 2680(h). We decline to take pendant jurisdiction of the state law misrepresentation claim against Schilling, and thus dismiss Count VI as to him, without prejudice, for lack of jurisdiction.

COUNT VII

Count VII alleges that the federal defendants disposed of plaintiff's assets without the required statutory notice. Defendants suggest that this count should be dismissed under *Chapman v. Sheridan-Wyoming Co.*, 338 U.S. 621, 629-31 (1950), and request that a briefing schedule be set. We do not understand *Chapman* to be dispositive, but agree that a briefing schedule is needed. Defendants may file a brief within 14 days. Plaintiffs may respond within 14 days thereafter and plaintiffs may have 10 days for reply. Briefs shall be limited to 15 pages.

---

[1] The only equitable relief prayed for in the complaint is removal of the receiver and rescission [sic] of the sale. As we stated in prior opinions, the only cause of action for removal of the receiver arises under 12 U.S.C. § 1464(d) and that claim has already been ajudicated in Count III. Thus, the only relief available to plaintiffs under the other counts (excluding Count VII, perhaps) is monetary.

COUNT VIII

"Count VIII" asserts no present claim but describes plaintiffs' intention to amend to assert a claim under the Federal Torts Claims Act once they have exhausted their administrative remedy. Since Count VIII in its present form does not state a cause of action, it is dismissed.

COUNT IX

Count IX alleges that the sale of Telegraph to First Federal Savings and Loan Association constituted an unlawful creditor preference. In *Lanigan v. Apollo Savings*, 52 Ill.2d 342, 288 N.E.2d 445, 450 (1972), the Court stated that "Basically, permanent reserve shares are risk capital and function as protection for withdrawable capital accounts." As investors of "risk capital," plaintiffs are not creditors. Count IX is dismissed for failure to state a claim.

COUNT X

Count X is a general re-allegation of the conduct complained of in the other counts. It seeks as relief a declaratory judgment that such conduct was illegal, the removal of the receiver, a rescission [sic] of the sale of the assets, money damages and attorneys fees. For the reasons stated in connection with the other counts, Count X must be dismissed. The exclusive cause of action for removal of a receiver is that already adjudicated in Count III. Moreover, the receiver is no longer in control of Telegraph, so the prayer for removal of the receiver seems moot.

The claim for money damages can only be brought under the Federal Tort Claims Act, and such a claim is either barred by the exception for misrepresentation or by the fact that plaintiffs have not exhausted their administrative remedy.

The claim for rescission [sic] of the sale of assets is already contained in Count VII, which is pending.

The prayer for attorneys fees does not require a separate count, because if attorneys fees are proper, they can be awarded on one of the other remaining substantive counts.

Accordingly, Count X is dismissed.

In summary, the only counts which remain are Counts IV as against the individual federal defendants and Count VII as against the federal defendants. All other counts are dismissed as indicated.

The court will certify appropriate issues for appeal pursuant to 28 U.S.C. § 1292(b) in connection with the judgment on Counts III and V and will consider certifying any other issues the parties believe are appropriate for review at this time. The parties are invited to submit within 10 days their suggested draft orders of certification, specifying with particularity those issues which satisfy the requirements of § 1292(b).

DATED: March 18, 1982

ENTER: [signature] John F. Grady
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 2792 Judge Grady

TELEGRAPH SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, etc., et al.,

Defendants.

DEFENDANT SCHILLING'S POSITION WITH RESPECT TO THE DISPOSITION OF THE REMAINING COUNTS

Pursuant to this Court's February 26, 1982 Order, defendant William J. Schilling, Commissioner of Savings and Loan Associations of the State of Illinois, hereby submits his position with respect to the disposition of the remaining counts of the Second Amended Complaint.

Schilling is named as a party defendant in five of the ten counts. Counts I and II are 42 U.S.C. § 1983 actions. Plaintiffs allege that Schilling's imposition of custody violated their due process rights as provided in Ill. Rev. Stat. ch. 32, ¶¶ 848, 852 (1979). The Illinois courts have not passed upon the meaning of those statutes under these circumstances.

If an unconstrued state statute is susceptible of a construction by the state judiciary which might avoid in whole or in part the necessity for federal constitutional

adjudication, or at least materially change the nature of the problem, abstention is required. *City Investing Co. v. Simcox*, 633 F.2d 56, 64 (7th Cir. 1980). Of course, a state court determination that Schilling's actions were proper would avoid the need for this Court to decide some or all of the federal questions plaintiffs present.

At a minimum, however, a state court construction of some of the terms of these statutes would materially alter the nature of the federal questions presented. Such terms include, *inter alia*, "emergency" [¶ 848(e)], "realizable value of its assets" [¶ 848(b)], "its permanent reserve capital is impaired" [¶ 848(b)], and "the association is unable to continue operation" [¶ 848(c)]. This court may abstain because the state court should decide such difficult questions of state law. *S.K. Olivar Co., Inc. v. Denton Ent., Inc.*, 413 F.Supp. 1336, 1338 (N.D. Ill. 1976).

With respect to those two counts, the state courts would have subject matter jurisdiction. Their jurisdiction is concurrent with the federal courts because those counts are 42 U.S.C. § 1983 actions.

Further, this Court should note that there is currently pending in the Illinois Appellate Court, First Judicial District, case No. 80-2153 in which plaintiffs have made challenges to Schilling's actions which are substantially identical to Counts I and II of the Second Amended Complaint. Schilling suggests that plaintiffs pursue that appellate review. A decision by that court could obviate the need for this court to decide the federal questions presented in this matter.

Count V names Schilling as a party defendant and alleges a conspiracy between him and the federal defendants to violate 12 U.S.C. §§ 1464(d)(6)(A) and 1729(c)(2). This Court disposed of that count in its February 19, 1982 memorandum opinion at p. 26, fn. 17.

Count VI alleges at tort of misrepresentation under the doctrine of pendent jurisdiction. This Court may refuse to assert such jurisdiction in accordance with *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966) if this Court disposes of the federal claims against Schilling.

In the alternative, this Court should apply state law and dismiss that count. Under state law, a suit brought against an officer or agency with relation to matters in which the defendant represents the State in action and liability, even though the State is not a party to the record, is in effect a suit against the State if the relief sought could operate to control the action of the State or subject it to liability. *Hudgens v. Dean*, 75 Ill.2d 353 (1979); *Schwing v. Miles*, 367 Ill. 436 (1937); *Scoa Industries v. Howlett*, 33 Ill. App. 3rd 90 (1st Dist. 1975); *Struve v. State Department of Conservation*, 14 Ill. App. 3d 1092 (3rd Dist. 1973). In this count, plaintiffs seek to hold Schilling, a state officer, liable in monetary damages in an action sounding in tort.

Thus, neither this Court, nor the circuit courts would have subject matter jurisdiction over such an action. It is a suit against the State which is barred by Ill. Rev. Stat. ch. 127, ¶ 801 (1979). Plaintiffs may obtain jurisdiction and seek redress for such a tort in the Illinois Court of Claims. Ill. Rev. Stat. ch. 37, ¶ 439.8(d).

Count X asserts a shareholders' derivative action. That count merely reasserts the preceding counts on behalf of Telegraph. Thus, the foregoing arguments apply to that count with the same force and effect as to the others.

As to all presently remaining counts, Schilling maintains that plaintiffs lack capacity to sue and that this suit must be dismissed (See "Memorandum in Support of Defendant Schilling's Motion to Dismiss the First Amended Complaint" pp. 5-7).

Respectfully submitted,

[Signature] Roger P. Flahaven

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APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 2792

TELEGRAPH SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, etc., et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

had at the hearing of the above-entitled cause before The Honorable JOHN F. GRADY, one of the Judges of said Court, in his courtroom in the United States Courthouse, Chicago, Illinois, on Friday, February 26, 1982, at the hour of 9:30 a.m.

PRESENT:

BAKER & MC KENZIE
(2800 Prudential Plaza
Chicago, Illinois 60601) by
MR. DANIEL J. O'CONNOR and
MR. MICHAEL K. MURTAUGH

appeared on behalf of the plaintiff;

HOPKINS & SUTTER
(One First National Plaza, 52nd Floor
Chicago, Illinois 60603) by
MR. ROBERT W. PATTERSON and
MR. JOHN L. ROGERS, III

appeared on behalf of defendant Federal Home Loan Bank Board and Federal Savings and Loan Insurance Corporation;

PRESENT: (Continued)

HON. TYRONE C. FAHNER
(Attorney General for the State of Illinois
160 North LaSalle Street
Chicago, Illinois 60601) by
MR. MICHAEL J. HAYES
Assistant Attorney General

appeared on behalf of defendant William J. Schilling;

HON. DAN K. WEBB, United States Attorney
(219 South Dearborn Street, 15th Floor
Chicago, Illinois 60604) by
MR. WILLIAM CLABAULT
Assistant United States Attorney

and

MR. JEFFREY M. WERTHAN
(Office of the General Counsel
Federal Home Loan Bank Board
1700 G. Street, N.W.
Washington, D.C. 20552)

appeared on behalf of defendants Janis and Dalton.

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* * *

MR. O'CONNOR: Your Honor, we would like an expression from the State, from the Attorney General, as to what it feels the jurisdiction will be in State Court should this Court abstain and a new action be filed. This goes to the question of fairness to the litigants, and the

Court has asked the Attorney General to express an opinion, and we would like to hear it.

THE COURT: Go ahead.

MR. HAYES: I was afraid they were going to do that, your Honor.

I am not sure what the problem is in relation to Counts I and II.

Counts I and II, as I see them in the second amended complaint that is now in front of your Honor, are two 1983 counts. I think they have been substantially decided in favor of the State defendants by the evidence that has been presented on the other counts, also dealing with good faith and reasonableness.

I am not sure and I am kind of puzzled by the Court's order indicating that there are important questions of State law involved here.

I can't identify them. What are the—

THE COURT: It is the question of whether this institution was unsafe and unsound, or whatever the State—

MR. HAYES: But what I am saying is—

THE COURT: —Court language is. That certainly isn't what I dealt with in our trial.

MR. MURTAUGH: It is a question of notice, your Honor.

THE COURT: Pardon?

MR. MURTAUGH: Whether this was an emergency situation justified.

THE COURT: Excuse me, emergency situation.

MR. MURTAUGH: Failure to give notice.

THE COURT: Right.

MR. O'CONNOR: It is also a question of whether or not the State Commissioner acted in such a way as to deprive the plaintiffs of their right to judicial review, to which they are entitled under the Illinois Savings and Loan Act.

MR. HAYES: I think those things can be resolved right here, short of sending it back to the State Court.

The only remedy in the State Court—

THE COURT: I would have to say only what the Illinois State Legislature meant by the term "emergency," and why should I do that?

MR. HAYES: Well, your Honor, I am not asking you to do that. What I am saying is it really doesn't matter. If it is an undefined term and if the institution is believed to be in an unsafe and unsound situation, or insolvent under Federal regulation, as the evidence was shown that it was and your order has said it was, I really am somewhat amazed at the fact that somebody could think that the Commissioner, who acted under the same type of financial information that was tried here, could make a determination like he did and somebody say it was made not in good faith.

If there had been a definition, a case law saying what emergency was, I think it would be a better case for the plaintiffs at that point.

THE COURT: It seems to me that you are mixing up a lot of different things here.

Well, I had hoped that we could get something done here in a short period of time, which is all I have for today. Obviously we can't.

MR. HAYES: Your Honor, can I just—

THE COURT: This case seems incapable of simple approaches or brief sessions.

So what I would like to do is to respond to this chart that the defendants have prepared. I haven't read it, but it looks like a good idea. So why don't you prepare just a very brief comment of your reactions to this and add anything you want and get it in here within the next few days so that we can get going on it.

MR. MURTAUGH: Could I suggest—and I am not asking for an order to this effect, but could I suggest that the Attorney General state a position as to what the jurisdiction of the State Court would be?

I think that is something that should be before your Honor before the Court makes a decision. It doesn't sound like that difficult a thing for them to do.

THE COURT: Well, I think if the State Attorney General takes the position that the case ought to remain here in Federal Court and that no part of it should be heard in the State Court, then I would want to have some analysis from him—

MR. MURTAUGH: Well, beyond that—

THE COURT:—supporting that proposition.

MR. MURTAUGH: Beyond that also, I would like to know what the State's position would be should the Court abstain on the issue of jurisdiction in the State Court.

THE COURT: You are worried that you will get over there—

MR. MURTAUGH: Absolutely. It has happened before.

THE COURT: —and then get whipsawed.

MR. MURTAUGH: It has happened before.

THE COURT: Well, all I hear from the State so far is that they want to stay here.

MR. MURTAUGH: Well, that is not really the question I am asking—

THE COURT: I know it is not the question you are asking.

MR. MURTAUGH: —and the State has been very careful in not taking a position on this until it comes up in the State Court, at which point they say, "There is no jurisdiction because the Federal Court has jurisdiction."

So it seems to me that this is something the Court would want to know before it made a decision on abstention.

THE COURT: Well, all right, we will ask the Attorney General to state whether or not he believes the State Court has jurisdiction of any of the remaining counts, and if not, why not.

MR. O'CONNOR: Your Honor, if I may interrupt a second, the plaintiffs filed Counts V through X. There is a pending motion to dismiss on them, and I believe they are all fully briefed. We didn't see any reason why the Court couldn't go on to rule on that.

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 2792

TELEGRAPH SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, et al.,

Defendants.

ORDER

Having adjudicated Counts III and V of the Second Amended Complaint, the court is prepared to proceed with the remaining portions of the case. All parties are requested to appear for a status hearing on February 26, 1982, at 9:45 a.m. to discuss the disposition of the remaining counts. In particular, the parties should be prepared to address the following questions:

(1) Whether this court should refuse to assert pendant jurisdiction over the counts based entirely upon state law (Counts I and II). These counts involve difficult questions of state law which are of first impression. The court is of the opinion that unless fairness to the litigants dictates otherwise, *U.M.W. v. Gibbs*, 383 U.S. 715, 726 (1966), the state courts should have the opportunity to address these claims.

(2) Whether this court should abstain from Count IV pursuant to *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). Count IV alleges that the conduct of state officials (aided only by federal officials) violated the federal constitution. The state law involved in Count IV is unsettled and a decision by the state courts may relieve us from passing on the federal question.

(3) Which of the remaining counts (Counts VI through X) cannot be adjudicated on a motion to dismiss or on a motion for summary judgment, and whether it would be helpful to have further briefs on Count VII.

(4) The status of Counts VIII and XI in view of our disposition of Count III. The claims in these two counts are brought under the Federal Tort Claims Act for the negligent conduct of officials of the Federal Home Loan Bank Board and the Federal Savings & Loan Insurance Corporation in connection with the "conversion of plaintiffs' assets." Second Amended Complaint. Does our holding that the receivership was lawful dispose of these claims as well?

(5) Whether this court should certify the question disposed of in Count III for interlocutory review pursuant to 28 U.S.C. § 1292(b).

No briefs shall be submitted on these questions unless and until requested by the court.

DATED: February 19, 1982

ENTER: [signature] John F. Grady
United States District Judge

APPENDIX E

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS, COUNTY DEPARTMENT,
CHANCERY DIVISION

No. 80 CH 4170

TELEGRAPH SAVINGS AND LOAN ASSOCIATION OF CHICAGO, and THE OFFICERS AND DIRECTORS THEREOF,

Plaintiff,

-vs-

WILLIAM J. SCHILLING, Individually and as COMMISSIONER OF SAVINGS AND LOAN ASSOCIATIONS FOR THE STATE OF ILLINOIS,

Defendants.

Report of proceedings has at the hearing of the above-entitled cause before the Honorable GEORGE A. HIGGINS, at 2302 Richard J. Daley Center, Judge of said Court, on the 30th day of June, A.D., 1980, at the hour of 10:30 o'clock A.M.

APPEARANCES:

MESSRS. BAKER & McKENZIE
BY: MR. DAVID R. MACDONALD
and MR. DANIEL J. O'CONNOR
130 East Randolph Street
Suite 2700
Chicago, Illinois 60601

Appeared on behalf of the Plaintiff;

MR. JEROME J. WEBB
Assistant Attorney General
160 North LaSalle Street
Suite 850
Chicago, Illinois 60601

Appeared on behalf of William J. Schilling, Defendant.

THE COURT: Are we all here on Telegraph? Okay. Gentlemen, let's commence, please, and proceed. We are on the State's Motion to dismiss, is that correct?

MR. O'CONNOR: Yes.

MR. WEBB: For the record, my name is Jerry.

THE COURT: I have received a reply to the—

MR. WEBB: Jerry Webb, attorney for the Attorney General's office.

MR. O'CONNOR: Dan O'Connor and James MacDonald for the Plaintiff.

MR. WEBB: Your Honor, for the record I have no objection to Telegraph being allowed to file a reply to the brief which I filed on Friday. My memorandum detailed our position on each and every one of the twelve grounds which we suggest are required for dismissal of this case.

I would rest on that memorandum and answer the questions which your Honor may have. I trust you had a chance to review it and review the authorities we have cited in that memorandum, including the Exhibits.

As to Telegraph's reply, the only thing which needs comment is their straw argument which characterizes mine as saying that the Federal Statute is preempted by the jurisdiction of this Court. I have no such argument.

I suggest that this Court has no jurisdiction for time and other reasons, and I state that Judge Marshall held in essentially the same case that there was no severable claim against the Commissioner.

I do not argue that the Federal Courts preempted this Court, that this Court does not have jurisdiction at this time.

MR. O'CONNOR: Just a few comments, Judge. Nothing that hasn't been put before the Court in writing already.

As we stated in our most recent filing, we are a State institution, we are suing in State Court, and we are suing the State Commissioner and we are framing our Complaint under a State Statute that requires that action pursuant to that statute be filed in the State Court.

So we think that a clearer case for this Court's jurisdiction couldn't be found.

And in the event the Court finds that there is some element of language missing from our Complaint, we would be happy to add it by way of amendment. There are only two ways that this Court, in our view, can be deprived of jurisdiction.

First is the ten-day issue which we have addressed in a motion on standing argument.

The second one is preemption. When the Attorney General quotes Judge Marshall to the effect that the claim against the Commissioner might not be severable, what Judge Marshall is really getting at there, it seems to me, analytically at least, is preemption, because the only way that it could be found that Count against the Commissioner was not severable is that 12 U.S.C. 1464 preempted State Court jurisdiction over Federally insured State institutions when they go into receivership.

This is a very important issue, Judge. No one has ever found that before. In no state law anywhere has there been found to be preemption by virtue of 1464.

The Federal Statute says that you can sue to remove receiver only in the Federal Court once the State has closed the institution down.

Nowhere does the Federal statute say that if you want to challenge the legality of the closing of the institution

you can only bring that in a Federal Court too, and that is essentially what the attorney general is arguing here.

Our position is a very narrow one; our Complaint is narrow. We are challenging a legal act, the taking of custody of our institutions which is State action taken by a State official under State law, and we submit it is this Court that must adjudicate this issue.

That's all we have, Judge.

MR. WEBB: I have nothing further.

THE COURTS: Well, Gentlemen, I have read the briefs and memoranda submitted by both parties, and of course, I am familiar with the underlying circumstances of the case.

We had extensive argument previously at the time the temporary restraining order was issued. The case subsequent to the issuance of that order be moved to the Federal Court, and the Federal Judge after hearing an extensive argument to the Federal Court will refuse to remand the proceedings back here.

I think on the basis of everything that's happened the Federal Court has assumed jurisdiction on the merits of the case. I note here that the Complaint filed in the new case, filed as of June 12, seeks a judgment of relief, Mr. O'Connor, and I don't know how the Court equitably can grant injunctive relief at the present posture of the case because you are asking us to join an act that has already been done, performed, and I don't know how I can, having read the Order, refer this matter fully to the State Court on a status quo basis as of the date of the seizure or the emergency act of the Commissioner closing Telegraph Savings.

I am firmly convinced that there are proceedings in front of the Court at the present time which afford an opportunity for adequate relief to Telegraph Savings or to any of its Directors who are parties to an action over there, and I think presently the proper action for this Court is to sustain the State's motion to dismiss.

MR. O'CONNOR: If I may make a comment, your Honor—

THE COURT: Sure.

MR. O'CONNOR: Initially, by way of sidelining, the Court commented on the fact that we seek injunctive relief. For the record, we seek any relief that is warranted and can be ordered under the Statute we plead.

And in the Mensik case the Court held that the relief can be granted by a chancellor under that Statute.

Secondly and more importantly, Judge, we want to point out to the Court that the State has filed no appearance nor answer or motion in Federal Court.

All right, now they are coming before this Court arguing that this Court does not have jurisdiction.

I would like this Court to explore whether or not the state considers that the Federal Court has jurisdiction over this issue, because that is crucial to the case before the Court.

In other words, if the Attorney General's going to take the position in Federal Court that Judge Grady has no jurisdiction to adjudicate the taking of custody because the Court requires it be done in State Court, I think the Court should be advised today of the Attorney General's position on this issue.

MR. MACDONALD: Moreover, your Honor, I'm afraid that they will go into the Federal Court and say that Judge Higgins dismissed this on the merits and therefore the issue is precluded from being determined in the Federal Court.

We would have to have it very clear as to what the basis of the dismissal is to be.

MR. O'CONNOR: We don't want to get caught somewhere without any jurisdiction.

Now, if the Attorney General has consented today that the Federal Judge has jurisdiction to adjudicate the taking of custody and to determine whether or not it was legal, then we would like that representation on the record, because that goes to the very heart of the issue before this Court, because I think if this Court felt that they were going to go down the street and tell Judge Grady he doesn't have any jurisdiction, then perhaps the Court might review his decision today.

THE COURT: Well, Gentlemen, I think the action before Judge Grady is an action that has not previously come to the attention of this Court. I am not familiar with the nature of that action.

I only know that the matter that was before me previously had been removed to the jurisdiction of Judge Marshall.

And I have given great consideration to Judge Marshall's comments and opinions regarding the disposition of the case as it affected the removal from this Court and his refusal to remand, and I fully believe under those circumstances that the Federal Court now has jurisdiction over the subject matter of the suit that you have filed in this Court.

As to additional relief on the part of this Court to prescribe additional equitable relief it would be my opinion under those circumstances, Mr. O'Connor, that if an action were sustained in the State Court the action would be in damages.

I fully believe that injunctive relief would not longer be effective under all the circumstances in the case, and that is my principal reason for sustaining the motion to dismiss.

MR. O'CONNOR: Is the Court saying by reason of that that that is a matter for the Law Division and not the Chancery Division to the extent it belongs in State Court?

THE COURT: I am only saying that if the suit was sustainable in the Circuit Court at the present time it would be a matter for the Law Division rather than for the Chancery Division.

I am not stating that this particular point is a reason for my dismissal of the State's motion at this time.

MR. O'CONNOR: At this time, Judge, for the record, I would like to make an oral motion to transfer the pending Complaint in this Court to the Law Division or to any other branch in the Circuit Court of Cook County that this Court feels has jurisdiction.

THE COURT: The Court is ready to sustain the State's motion in this case.

MR. O'CONNOR: Thank you, Judge.

(WHEREUPON, motion was adjourned.)